Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-119

NOVEMBER TERM, 2008

Billings Mobile Manor Residence Association, et al.	}	APPEALED FROM:
v.	}	Rutland Superior Court
Billings Mobile Manor, Inc.	}	DOCKET NO. 97-1-07 Rdcv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Landlord of a mobile home park appeals from the superior court's order granting tenants partial abatement of the lot rent increase it sought for the year 2007. We affirm.

Tenants reside in a mobile home park located in Rutland City and Rutland Town owned by landlord. For 2006, the lot rent was $265.53 per month. In October 2006, landlord gave tenants notice of a lot rent increase to $299.27, an increase of 12.42%, to become effective January 1, 2007. Mobile lot rent increases are regulated by statute. Generally, lot increases may occur only once per year by way of a written lease. 10 V.S.A. § 6236(c). If a proposed rent increase is more than one percent above the Consumer Price Index (CPI), a majority of tenants are entitled to compel mediation, id. § 6252(a), and, if mediation is unsuccessful, the tenants may bring an action for abatement of the lot rent increase on the grounds that it is "clearly excessive." Id. § 6253(a). For 2006, the CPI for housing was 4.2%.

In this case, landlord's rental increase notice explained that the large increase was necessary to reflect significant changes in the cost of water and sewer services as well as property taxes. The notice broke down the increase as follows:

CPI Increase	$11.14
Increase from property taxes	$15.54
Increase in water and sewer	$ 6.31
State of Vermont lot fee	$ .75

A majority of the tenants invoked mediation, which was unsuccessful. The tenants then brought an action in superior court to abate the proposed increase. To justify the increase, landlord relied on a

sentence in § 6236(c) providing that rental and utility charges "may be increased during a year if the operating expenses of the park increase 20 percent or more during that year as the result of legislative action taken during that year and the increase could not have been anticipated."[1] Landlord argued that the increase was justified based on (1) the recent property reassessment, which resulted in a substantial property tax increase, and (2) an increase in water and sewer rates. Landlord contended that these increases were unanticipated, more than twenty percent of operating expenses, and due to "legislative action" during the year.

Following a hearing, the court granted tenants' request for abatement. The court concluded that the sentence in § 6236(c) relied upon by landlord and implemented by § 4.6.3 did not apply to the circumstances of this case because periodic adjustments relating to known expenses such as property taxes and water/sewer fees are not unanticipated costs that result from legislative action. The court then examined whether the increase was clearly excessive under the statutory definition. A lot increase is clearly excessive if it "is unreasonable based upon the park owner's total reasonable or documented expenses, including consideration of debt service and a reasonable return to the mobile home park owner on investment with consideration being given to comparable investments." 10 V.S.A. § 6253(c). It was undisputed that in 2006 landlord had a net income of $66,790. Both parties presented expert testimony on the issue of whether this represented "a reasonable return" on landlord's investment. Tenants' expert testified that landlord's return on investment should be calculated based on income relative to landlord's original investment of $205,000—the amount landlord paid for the park in 1996. According to this formula, the expert opined that landlord had a rate of return of 32.6%, and that this was a high rate compared to the normal range of 10-15% for real estate. In contrast, landlord's expert testified that the rate of return should be calculated based on income relative to current fair market value. Given a current fair market value of $618,200, the expert calculated a rate of 10.8% for 2006, and explained that it was low relative to most real estate investments, which should yield a 12-16% return.

The superior court considered the testimony of both experts, but ultimately arrived at a different conclusion from either, explaining that a reasonable return rate involves the inclusion of both cash income and capital appreciation. After combining these and adjusting for increases in expenses, the court found that landlord's return on investment was between 12-17%, and that this was a reasonable rate for landlord's real estate investment. While the court recognized that landlord's increased expenses justified some rental increase, the court found that landlord's calculation of expense increases due to changes in property taxes and water/sewer charges were not as substantial as landlord professed and that a 2% increase would still provide landlord with a reasonable rate of return on its investment. Thus, the court abated the mobile home lot increase for 2007 to $271.59.

On appeal, landlord argues that the court erred in holding that § 4.6.3 was inapplicable and finding that the proposed lot rent increase was clearly excessive. We first consider whether the court correctly determined that § 6236(c) and § 4.6.3 were not applicable in this case. We uphold the court's determination, but not on the ground relied on by the court—that the increased operating expenses were of a type that landlord should have anticipated. We need not consider whether the claimed

[1] Landlord also relied on the implementing administrative rule stating that "a mobile home park owner may increase rental charges during a year to the extent necessary to cover an increase in operating expenses, but only in the event of an unanticipated increase of 20 percent or more in the mobile home park's operating expenses which is the result of legislative action taken during that year." See Agency of Commerce and Community Development, Housing Division Rules, Part I: Mobile Parks § 4.6.3.

increase in operating expenses should have been anticipated, or whether the action of the municipalities to increase property taxes and water/sewer rates should be considered "legislative action," because landlord failed to demonstrate that its operating expenses increased more than twenty percent, as required by § 6236(c) and § 4.6.3. See 10 V.S.A. § 6252(b) (stating that "mobile home park owner shall have the burden of providing information to show that proposed lot rent increase is reasonable"). Thus, we agree with the court that landlord's rental increase does not fall within the exception outlined in § 6236(c) and § 4.6.3.

At trial, as here on appeal, landlord claimed that it paid over 50% increases in property tax and water/sewer rates. In support of this claim, landlord submitted invoices as well as tax returns for the relevant years. The trial court explicitly found, however, that there were discrepancies between the increased amounts claimed by landlord and the actual amounts paid by landlord as set forth in landlord's tax returns. The court also found that landlord was unable to explain those discrepancies through testimony. Based on the tax returns, the court found that the property tax increase was $3357 rather than $6715, as landlord claimed, and that the increase in water/sewer charges was either $4677 or $4887 rather than the $10,322 landlord claimed. The court also found that landlord's total operating expenses for 2006, as indicated in its tax return, were $37,309, which was roughly a 12% increase over the operating expenses as set forth in landlord's 2005 tax return. Thus, landlord failed to meet its burden of demonstrating a sufficient increase in operating expenses to trigger § 6236(c) and § 4.6.3.

On appeal, landlord argues that we should rely on the unchallenged invoices it submitted into evidence rather than its tax returns in measuring the increase in its operating expenses. We see no basis to overturn the trial court findings and measure landlord's expenses by invoices rather than its own statements as to what it actually paid. See P.F. Jurgs & Co. v. O'Brien, 160 Vt. 294, 300-01 (1993) ("Findings of fact will be set aside only when they are clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses and the weight of the evidence."); Highgate Assocs. v. Merryfield, 157 Vt. 313, 315 (1991) ("A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding."). Landlord suggests—without offering any calculations to support its suggestion—that the discrepancy in expenses paid could be due to the fact that tax returns are done according to calendar years, while property taxes and water and sewer charges are calculated within fiscal years. This suggestion fails to satisfy landlord's burden of demonstrating that the trial court's findings were clearly erroneous. See Ruhe v. Ruhe, 142 Vt. 429, 431 (1983) (reasoning that where the party challenging the findings of the trial court offers no clear explication of the alleged error, the trial court's findings must stand).

Nonetheless, landlord argues that the trial court erred in concluding that its proposed rent increase was clearly excessive. To assess whether the increase was clearly excessive, the trial court had to determine if the increase was reasonable based on landlord's expenses and considering a reasonable rate of return. See 10 V.S.A. § 6253(c). Based on the testimony at trial, the court found that a calculation of landlord's return on its investment should include income for the year and the annual capital appreciation of the investment. Thus, the court combined landlord's income of $66,790 with an estimated annual appreciation of $37,545,[2] and, when compared to the property's fair market value of $618,000, calculated landlord's return on investment as 17%. Accounting for increased expenses and other costs, the court explained that the return was somewhere between 12% and 17%.

[2] The court explained that the value of the property had increased from $205,000 to $618,000 over eleven years and therefore estimated an average yearly appreciation of $37,545.

The court's findings were based on the testimony of both tenants' and landlord's experts. Landlord argues that capital appreciation cannot be included in the return on investment because appreciation is uncertain and not easily liquidated. Both experts, however, agreed that return on investment should include appreciation. Tenant's expert testified that if return on investment was based on income relative to current fair market value, then one would also need to factor in the appreciation of the asset. Landlord's expert agreed that a calculation of the annual rate of return should include income for the period as well as any appreciation in the value of the investment. Landlord's expert admitted that his figure of 10.8% did not include capital appreciation.

In challenging the trial court's conclusion that its proposed rent increase was clearly excessive, landlord relies primarily on what the trial court found to be inflated figures for the claimed increase in his operating expenses. We have already upheld the trial court's findings in this regard. Landlord argues, however, that in reducing its rent increase to 2%, the trial court erred by relying on faulty methodology to calculate appreciation in its property and by ignoring the 4.2% increase in the CPI. As for its first point, landlord contends, with little explanation or support in the record or in the law, that the methodology chosen by the trial court makes little sense and depends upon speculative numbers. The trial court based its decision on expert testimony, and landlord had failed to demonstrate clear error in the court's weighing of that testimony. See Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it was the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). Because the court's finding concerning the value of landlord's return on its investment is supported by some evidence and not clearly erroneous, we decline to disturb it on appeal. Accordingly, we agree with the trial court that landlord's increase was clearly excessive, and affirm the court's decision to abate the rental increase to 2%. Landlord complains that this amount is below the increase in the CPI, but nothing in the applicable statute requires the court to permit a rate increase that is at least as high as the increase in the CPI.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice